BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN L. BAIRD Claimant VS. **CITY OF ARKANSAS CITY** Respondent AND **KANSAS MUNICIPAL INS. TRUST** Insurance Carrier	)	Docket No. 1,037,356

ORDER

Claimant requested review of the August 29, 2008 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on November 21, 2008.

APPEARANCES

Orvel Mason, of Arkansas City, Kansas, appeared for the claimant. Jeffery R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition to the stipulations contained within the Award, at oral argument the parties agreed that the ALJ's assessment of functional impairment (10 percent to the whole body) is not in dispute. The parties also agreed that the ALJ should have considered Jon Moore's deposition but that, for whatever reason, he did not. Nevertheless, the parties agree that the Board can go forward and consider Mr. Moore's deposition for purposes of this appeal and that a remand is not required, nor requested. Finally, only those chiropractic bills that were incurred after January 22, 2007 are in dispute for purposes of this appeal. Up until that time the chiropractor was authorized but after that date, respondent maintains that any chiropractic treatment was unauthorized and subject to a statutory limit of $500.

ISSUES

The ALJ concluded that claimant voluntarily retired from her dispatcher position, a job that he concluded was "well within the restrictions" placed upon her by Dr. Stein and Dr. Hufford. And because claimant voluntarily terminated her employment, "she is limited in her recovery" to the 10 percent functional impairment. The ALJ also concluded that any visits with Dr. Swanson, the chiropractor, after January 22, 2007 were unauthorized and thus subject to the statutory limit under K.S.A. 44-510h(b)(2).

Claimant has appealed and advances two issues for purposes of this appeal. First, claimant maintains that all of her chiropractic treatment was authorized for the simple reason that she was never "disabused" of respondent's decision to de-authorize Dr. Swanson's treatment. Second, claimant contends that her decision to retire[1] from her job as a dispatcher was sound inasmuch as she was unable to perform that job without further pain, discomfort and ultimate injury. The nature of her job was such that her restrictions could not be accommodated, nor had respondent demonstrated any meaningful willingness to accommodate her restrictions. Thus, she maintains she is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a) of 56 percent, which reflects a 50 percent task loss and a 62 percent wage loss.

Respondent argues that the ALJ's Order should be affirmed in all respects. Respondent maintains the ALJ's analysis both as to the chiropractic bills and to claimant's entitlement to work disability is soundly supported by both the facts and law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent for 37 years. In the last 15 years of her employment she was chief dispatcher, assigned to answer phone calls from citizens, radio calls from the police, fire and emergency personnel as well as cellular 911 calls. She would also input information from those calls into a computer and dispatch the appropriate individual(s) based on the calls. Claimant was also required to deal with the public when they entered the station house and when needed, to assist in pat downs and strip searches of female detainees. This job required her to constantly monitor computer screens, the public window, phones and assist other personnel in the monitor area. She worked the evening shift which often left her with less help than was available during the day.

[1] The parties agree there is no issue regarding a retirement offset pursuant to K.S.A. 44-501(h).

On July 19, 2005, the claimant was attending a training session when she fell in an auditorium, suffering a compensable injury. Although she landed on her knees, the next day she reported pain in her back, hip and shoulders along with achiness in her knees. She was referred to Dr. Schmeidler who ordered physical therapy, medications and conservative care. He also imposed restrictions of no bending, stooping or exertion.[2] Claimant was released by Dr. Schmeidler on August 26, 2005.

When claimant continued to suffer from pain complaints she was seen by Dr. Stein in November 2005. He referred her for epidural injections with Dr. Manasco, but in April 2006 claimant was released at full duty. Claimant had difficulty working and went to see Dr. Yoachim, Dr. Schmeidler's partner in July 2006. The two of them concluded that maybe taking two weeks off work might prove helpful so he took her off work. When the Chief of Police was informed of claimant's intended absence, he asked claimant if he (the Chief) could speak to the doctor. Claimant authorized this. After the Chief talked to Dr. Yoachim, claimant was released to return to work with restrictions that would allow her frequent breaks.

Claimant returned to work but according to her, they were unable to meet her need for frequent breaks. Moreover, claimant was required to work longer hours because the department was short on personnel. On one particular day claimant was in such pain that she mentioned to a coworker she might have to take a sick day to rest. She maintains that the Chief of Police called her in and threatened to fire her if she failed to appear for work the next day. The following Monday, claimant decided to retire effective September 15, 2006.

Since leaving respondent's employ claimant has not made any effort to find appropriate employment. Mr. Lindahl has testified that claimant retains the ability to earn anywhere from $7.50 to 9.00 an hour as a clerical or customer service worker.

Just before she left her job with respondent claimant returned to see Dr. Yoachim who recommended chiropractic treatment with Dr. Brad Swanson beginning August 2006. The chiropractic treatment was initially authorized by Victoria Vanderhoof, the Senior Claims Adjuster for the insurance carrier. The first series of 12 visits began August 14, 2005. Then, on September 18, 2005 another 12 treatments were authorized. On October 26, 2006, another 18 visits were authorized. When Ms. Vanderhoof spoke with claimant about this last round of treatment she explained that she would revisit the issue at the end of the 18 visits.[3] It was Ms. Vanderhoof's intention that if claimant continued to have complaints, she would refer claimant back to Dr. Stein for further evaluation and would not continue to authorize further visits. Beyond her statement about revisiting the issue, she

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[2] R.H. Trans. (June 2, 2008) at 12-13.

[3] Vanderhoof Depo. at 28.

never wrote to claimant or called her to specifically disabuse claimant of Dr. Swanson's status as an authorized treating physician.

The last of the 18 chiropractic visits occurred on January 22, 2007. After that time and up to April 9, 2007, Dr. Swanson's treatment of claimant and the corresponding bills were treated as unauthorized treatment. Ms. Vanderhoof wrote to Dr. Swanson on April 9, 2007 and May 3, 2007 and informed him that no further treatment would be paid for other than as unauthorized treatment under K.S.A. 44-510h(b)(2).

Three physicians spoke to the issue of claimant's task loss. Dr. Stein treated claimant beginning November 21, 2005 and diagnosed cervical spine problems along with inflammation of the left sacroiliac joint. He recommended injections and physical therapy but did not impose any work restrictions before releasing her from active treatment in April 2006. When asked at his deposition to review Mr. Lindahl's task analysis, he opined that as of April 2006 claimant had lost, at most, 1 out of the 8 tasks she had performed in the last 15 years.

Claimant was also examined by Dr. C. Reiff Brown on December 14, 2007. Dr. Brown diagnosed cervical and lumbar sprain and aggravation of pre-existing degenerative disc disease in both the lumbar and cervical area. He assigned permanent restrictions which included no lifting over 20 pounds occasionally and 15 pounds frequently. He also recommended that she avoid flexion and rotation of her back and neck. Specifically, she should not exceed a 30 degree angle while looking up. Finally, he suggested she be allowed to get up and move around as needed. He reviewed Mr. Lindahl's list and concluded that she sustained a 50 percent task loss.

Respondent retained Dr. David Hufford to examine claimant and speak to the issue of her functional impairment[4] and restrictions. He testified that claimant had no structural abnormalities and could work as tolerated. Thus, she had no resulting task loss. He explained that claimant does not require restrictions. Rather, with her it was more of a tolerance issue and allowing her to do what she can put up with.[5]

Dr. David Schmeidler also testified regarding claimant's initial treatment and explained that had he known more of her job tasks when he released her, he would have given her restrictions.[6] He testified that she could return to work as long as she was permitted frequent positional changes and breaks every 2 hours for 5-10 minutes. He also opined that claimant had retained the ability to do all but two of the tasks outlined by Mr.

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[4] As indicated earlier, the functional impairment issue is no longer in dispute.

[5] Hufford Depo. at 27.

[6] Schmeidler Depo. at 18.

Lindahl and of those 2, he might restrict her from doing them depending on the weights and number of repetitions involved.

The ALJ did not reference or acknowledge the testimony of former Lieutenant Jon Moore, one of claimant's coworkers.[7] Mr. Moore's testimony is particularly supportive of claimant's contention that she was unable to perform her job as a dispatcher given her physical limitations and that respondent was unable to accommodate those restrictions. He testified about the layout of the work space where claimant was assigned. He explained how claimant would be required to sit at a bank of monitors which were stacked on top of the desk, moving back and forth between computers and phones. The configuration of this area is such that claimant would have to look up more than 30 degrees to see the monitors, particularly when you consider that she wears bifocals. That, coupled with the fact that claimant would have to look up at the window when the public was entering the building, work on a computer to input information gathered, all while manning the desk primarily when she was alone. He agreed with claimant's contention that she would not be afforded frequent breaks primarily because of the busy nature of the job.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find - or in this case retain - appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[8]

If the ALJ had the benefit of Mr. Moore's deposition testimony[9] he might well have come to a different conclusion about claimant's ability to perform her duty as dispatcher. This factual conclusion is the lynch pin of the ALJ's decision to deny claimant a work disability under K.S.A. 44-510e(a). He concluded that claimant's decision to retire based upon her inability to perform her job demonstrated a lack of good faith. Yet that decision

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[7] Lieutenant Jon Moore retired from the Police Department and will hereinafter be referred to as Mr. Moore.

[8] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999). But this analysis may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in Foulk and Copeland. See Casco v. Armour Swift-Eckrich, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).; and Graham v. Dokter, 284 Kan. 547, 161 P.3d 695 (No. 95,650 filed July 13, 2007).

[9] It does not appear that the ALJ overlooked Mr. Moore's deposition. Rather, it appears that Mr. Moore failed to return the transcript in a timely manner and the transcript failed to make it to the file. Nonetheless, the parties agreed that it was to be considered.

was founded upon his belief that claimant *could* perform the job of dispatcher. But when Mr. Moore's uncontroverted testimony about the practicalities of her job is considered in light of the significant testimony which indicates that indicates claimant was restricted in her ability to flex her neck, look up at monitors and not allowed to take frequent breaks, the Board concludes that she could not. And consequently, her decision to retire did not constitute a lack of good faith. The ALJ's decision on this issue (as it relates to her decision to retire) is reversed. Therefore, she is entitled to a work disability based upon an average of her wage and task loss as set forth in K.S.A. 44-510e(a).

The task loss opinions vary from 0 percent (Dr. Hufford), 12 percent (Dr. Stein) to as much as 50 percent (Dr. Brown). Under these facts and circumstances, the Board is persuaded by Dr. Brown's testimony as it is more consistent with the actual workplace requirements than the opinion expressed by either Dr. Hufford or Dr. Stein.

And as for wage loss, there is no dispute that claimant is presently unemployed and has made no effort to find appropriate post-injury employment. Thus, she is presently earning 0 wages. In light of *Foulk*[10] and *Copeland*[11], the Board finds her failure to attempt to find employment as a lack of good faith and we must therefore impute a wage to her based upon the evidence contained within the record. Mr. Lindahl indicated claimant was capable of earning between $7.50 - $9.00 an hour in a clerical position. The Board is persuaded that claimant retains the ability to earn $8.25 an hour which translates to $330 per week and a 62 percent wage loss. When the 62 percent is averaged with the 50 percent, the result is a 56 percent work disability. The Board hereby finds claimant sustained a 56 percent work disability as a result of her work-related injury.

Turning now to the issue of the chiropractic bills that were incurred after January 22, 2007, K.S.A. 44-510h states in pertinent part:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[12]

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[10] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995);

[11] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

[12] K.S.A. 44-510h.

K.S.A. 44-510h, as noted above, requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.[13]

It is a long standing rule that once medical treatment is provided, the employer and its carrier are under a duty to disabuse the claimant of the intention to continue to provide treatment in order to avail themselves of any timeliness defense.[14] Similarly, once medical treatment is provided there is an obligation to clearly indicate to the claimant that no further authorized treatment will be forthcoming if the carrier intends on asserting that medical treatment is unauthorized.

Here, the adjuster made certain statements to claimant about reevaluating the direction of her care at the conclusion of the last round of chiropractic treatments. But the evidence shows that only Dr. Swanson was explicitly told that no further treatments were authorized after the last 18 visits. The adjuster handled the post-January 22, 2007 bills internally as if they were unauthorized, but never took the additional step of contacting claimant and explaining that no further treatments would be authorized and instead, that they would be paid only as unauthorized. While it is true that Ms. Vanderhoof told claimant that only a certain number of visits was authorized, it is difficult to know how claimant could understand, given the length of her treatment, precisely how many visits she had left and at what point she was proceeding on her own. Ms. Vanderhoof was able to monitor that situation more easily and routinely than claimant and a letter or brief phone call would have sufficed. Instead, all claimant was left with was a vague statement on October 26, 2006 that the matter would be revisited after the last 18 visits. Under these facts and circumstances, a majority of the Board finds that respondent and its carrier should be held responsible for the chiropractic treatment with Dr. Swanson, including those visits occurring on and after January 22, 2007 and up to April, 9, 2007. Claimant was not clearly disabused of her right to continue treating with Dr. Swanson. Those visits, for the period claimed, are considered authorized and are to be paid as such.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 29, 2008, is reversed and modified as follows:

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[13] *See Carr v. Unit No. 8169,* 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

[14] See e.g. *Blake v. Hutchinson Manufacturing*, 213 Kan. 511, 515, 516 P.2d 1008 (1973); *Brant v. Blue Hill Feeders*, No. 1,003,336, 2003 WL 2108761 (Kan. WCAB Apr. 4, 2003).

The claimant is entitled to permanent partial disability compensation at the rate of $467.00 per week not to exceed $100,000.00 for a 56 percent work disability.

As of December 11, 2008 there would be due and owing to the claimant 177.29 weeks of permanent partial disability compensation at the rate of $467.00 per week in the sum of $82,794.43 for a total due and owing of $82,794.43, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $17,205.57 shall be paid at the rate of $467.00 per week until fully paid or until further order from the Director.

Respondent is ordered to pay the chiropractic bills from Dr. Swanson listed in Exhibit 1 of the Regular Hearing Transcript for the period ending on April 9, 2007.

K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he/she must file and submit his/her written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of December 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's decision to compel respondent and its carrier to pay for the chiropractic bills after January 22, 2007. Claimant was put on notice that she was authorized to see Dr. Swanson for 18 additional visits. It is incumbent upon a claimant to keep abreast of his or her care. Claimant was

well aware that her chiropractic care would not continue forever and Ms. Vanderhoof explained that after the last 18 visits the issue would be reconsidered. Just as the majority believes Ms. Vanderhoof could have contacted claimant, so too could claimant have sought out the information from either Ms. Vanderhoof or Dr. Swanson, particularly when the only claim and resulting medical treatment she had to consider was her own.

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BOARD MEMBER

c: Orvel Mason, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge